

KAUA'I PLANNING COMMISSION
CONTESTED CASE CALENDAR
September 12, 2017

The contested case calendar of the Planning Commission of the County of Kaua'i was called to order by Chair Keawe at 11:04 a.m., at the Lihu'e Civic Center, Mo'ikeha Building, in meeting room 2A-2B. The following Commissioners were present:

Chair Kimo Keawe
Mr. Roy Ho
Mr. Wade Lord
Mr. Sean Mahoney
Ms. Glenda Nogami Streufert

Absent and Excused:
Ms. Heather Kanoe Ahuna
Ms. Donna Apisa

The following staff members were present: Office of the County Attorney – Deputy County Attorney Peter Morimoto; Planning Department – Commission Secretary Leslie Takasaki; Office of Boards and Commissions – Administrator Paula M. Morikami, Commission Support Clerk Darcie Agaran

Discussion of the meeting, in effect, ensued:

CALL TO ORDER

Chair Keawe called the Contested Case Calendar to order at 11:04 a.m.

CALENDAR

Action on following matters on the Planning Commission Contested Case Calendar of 12/13/16 and 2/28/17; deferred on 12/13/16, 2/28/17, 5/9/17, and deferred on 7/25/17 for decision making on 9/12/17 pertaining to:

Petitioners Kirby B. Guyer and Milton Searles' Motion to Disqualify Hearing Officer, Declaration Jonathan J. Chun; Certificate of Service (related to Application for a Use Permit, Special Management Area Permit and Class IV Zoning Permit on Property Situated at Hā'ena, Kaua'i, Hawai'i identified by Kaua'i TMK No. (4)5-8-012: 22 containing a total area of 11,827 sq. ft.) [Deferred 12/13/16, deferred 2/28/17.]

Petitioners John R. Hoff Trust and Lorna E. Hoff Trusts' Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to Appeal Decision of Planning Director Relating to the Notice of Violation and Order to Pay Fines

Related to Use Permit U-2015-28, Special Permit SP-2015-9 and Class IV Zoning Permit Z-IV-2015-29 on Property Situated at Lāwa‘i, Kaua‘i, Hawai‘i, identified by Kaua‘i TMK No. (4) 2-5-005: 080 CPR Unit 1 containing a total area of 1.032 acres) (contested case files CC-2015-18, CC-2016-7) [Deferred 12/13/16, deferred 2/28/17.]

Petitioners *Lloyd R. Fischer and Shirley E. Fischer*’s Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to Petition to Appeal Decision of Planning Director Relating to the Forfeiture of Non-Conforming Use Certificate TVNCU #5003 for Property Situated at Kekaha, Kaua‘i, Hawai‘i, identified by TMK No. (4)1-3-001: 88 containing a total area of 12,453 sq. ft. (contested case files CC-2016-9, CC-2016-10) [Deferred 12/13/16, deferred 2/28/17.]

Petitioner *Todd Schirm*’s Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to Petition to Appeal Decision of Planning Director Relating to the Forfeiture of TVNCU # 5138 (Hale Cook) for Failure to Renew for Property Situated in Wainiha, Kaua‘i, Hawai‘i, identified by Kaua‘i TMK No. (4)5-8-009: 8 CPR Units 1 and 2 containing a combined total area of 11,250.0 sq. ft.) (contested case file CC-2015-24) [Deferred 12/13/16, deferred 2/28/17.]

Petitioners *Bryson K. Nishimoto and Catherine J. Nishimoto*’s Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to Petition to Appeal Decision of Planning Director Relating to the Forfeiture of TVNCU #1171 (Ivy’s Place) for Failure to Renew for Property Situated in Wainiha, Kaua‘i, Hawai‘i, identified by Kaua‘i TMK No. (4) 5-8-004: 26 containing 8.343 acres) (contested case file CC-2015-23) [Deferred 12/13/16, deferred 2/28/17.]

Petitioner *Michael Chandler*’s Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to Petition to Appeal Decision of Planning Director Relating to the Forfeiture of TVNCU # 4222 (Hale O Lani) Related to Special Permit SP-2012-1 for Failure to Renew for Property Situated at 3239 A Kalihiwai Road, Kīlauea, Kaua‘i, Hawai‘i, identified by TMK No. (4)5-3-003: 45 containing an area of 74,923 sq. ft.) (contested case file CC-2016-4) [Deferred 12/13/16, deferred 2/28/17.]

Petitioners *John Wark and Shannon Wark*’s Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to Petition to Appeal Decision of Planning Director Relating to the Forfeiture of TVNC #4219 (‘Anini Kai) related to Special Permit SP-2011-13 for Failure to Renew for Property Situated at 3525 ‘Anini Road, Kīlauea, Kaua‘i, Hawai‘i identified by TMK No. (4)5-3-004: 29 containing an area of 13,608 sq. ft.) (contested case file CC-2016-5) [Deferred 12/13/16, deferred 2/28/17.]

Petitioners *Parnell H. Kaiser and Michele L. Kaiser*’s Motion to Disqualify Hearing Officer; Declaration of Jonathan J. Chun; Certificate of Service (related to Application for a Use Permit, Special Management Area Permit and Class IV Zoning Permit on Property Situated at Hanalei, Kaua‘i, Hawai‘i, identified by Kaua‘i TMK No. (4)5-5-004:

15 containing a total area of 6,046 sq. ft.) (contested case file CC-2015-15) [Deferred 12/13/16, deferred 2/28/17.]

Motion to Disqualify Hearing Officer; Certificate of Service (related to Petition to Appeal of Planning Director; and Application for a State Special Permit, etc. (Consolidated Cases) by *Michael Levy and Alexis Boilini*, Trustees of the Levy-Boilini Living Trust (contested case CC-2015-14, CC-2016-1) [Deferred 12/13/16, deferred 2/28/17.]

Petitioner's *Steven and Eddi Henry* Motion to Disqualify Hearing Officer; Certificate of Service (related to Petition for Appeal of Decision of Planning Director; and, Application for a State Special Permit, etc.) (contested case file CC-2016-11) [Deferred 12/13/16, deferred 2/28/17.]

Petitioner's *William I. Cower and Catherine F. Cower* Motion to Disqualify Hearing Officer; Certificate of Service (related to Petition to Appeal Decision of Planning Director; and, Application for a State Special Permit, etc. (Contested Cases) (contested case files CC-2015-7, CC-2016-2) [Deferred 12/13/16, deferred 2/28/17.]

Petitioner *Anthony S. Bardin* Motion to Disqualify Hearings Officer; Declaration of Sommerset K.M. Wong; Certificate of Service (related to Petition to Appeal Decision of Planning Director Relating to TVRNCU #1225 for Property Situated in Hanalei, Kaua'i, Hawai'i, identified by Kaua'i TK No. (4)5-5-010: 39 containing 5,654 sq. ft.) (contested case file CC-2013-83) [Deferred 12/13/16, deferred 2/28/17.]

Petitioner's *Greg Allen, Sr. and Greg Allen, Jr.* Motion to Disqualify Hearings Officer; Declaration of Sommerset K.M. Wong; Certificate of Service (related to Petition to Appeal of Violation and Levy of SMA Fines Involving Property Situate in Kīlauea, Kaua'i, Hawai'i, identified by Kaua'i TMK No. (4)5-3-007: 14, and containing a total area of 16,552.0 sq. ft.) (contested case file CC-2015-4) [Deferred 12/13/16, deferred 2/28/17.]

Petitioners *Thomas J. Brooks and Jennifer S. Brooks*' Motion to Disqualify Hearings Officer; Declaration of Jonathan J. Chun, Certificate of Service (1/30/17) (related to Petition to Appeal Decision of Planning Director Relating to the Forfeiture of Non-Conforming Use Certificate TVNCU #4291 (Pohaku), TMK No. (4)58008021, Hā'ena, Kaua'i.) (contested case file CC-2017-1) [Referred to Hearings Officer 1/24/17.]

Petitioner *Alexandra Falk Living Trust*'s Motion to Disqualify Hearing Officer, Declaration of Jonathan J. Chun, Certificate of Service (related to Petition to Appeal Decision of Planning Director Relating to the Forfeiture of Non-Conforming Use Certificate TVNCU #4298 (Hale Mahana), TMK No. (4)5-8-010:15(3), Hā'ena, Kaua'i) (contested case file CC-2017-2)

Petitioner *Alexandra Falk Living Trust*'s Motion to Disqualify Hearing Officer, Declaration of Jonathan J. Chun, Certificate of Service (related to Petition to Appeal Decision of Planning Director Relating to the Forfeiture of Non-Conforming Use

Certificate TVNCU #4299 (Lihi Kai), TMK No. (4)5-8-010:15(1), Hā'ena, Kaua'i
(contested case file CC-2017-3)

Chair Keawe: We would like to call this meeting to order. This is a contested case hearing and action on the following matters on the Planning Commission Contested Case Calendar of 12/13/16 and 2/28/17; deferred on 12/13/16, 2/28/17, 5/9/17, and deferred on 7/25/17 for decision-making today, 9/12/17. I would like to ask if we can waive the reading of the calendar. If there are no objections, we can go ahead and do that. And then, can the attorneys for the petitioners please come forward and identify yourselves? We would like to find out if you are going to consolidate your arguments or each of you will be presenting individually.

Mr. Barry Edwards: I am Barry Edwards. I represent three (3) of the people on your calendar today. We've got a procedural issue which is going to change the process a little bit and I think Mr. Bradbury would like to discuss that with you.

Chair Keawe: Okay. Can you get up to the mic so we can hear you?

Mr. Greg Kugle: Yes. Good morning, Commissioners. I am Greg Kugle. I represent two (2) of the petitioners, or movants, before you today – Anthony Bardin and Greg Allen.

Chair Keawe: Okay.

Deputy County Attorney Mark Bradbury: Good morning, Chair Keawe and fellow Commissioners. I represent one (1) case, but as I am going to be discussing now, I am going to be representing all of the cases, just for the purpose of what we are deciding to do.

Chair Keawe: Okay.

Mr. Jonathan Chun: Jonathan Chun on behalf of eight (8) of the petitioners and yes, we agree to waive the reading of the calendar.

Chair Keawe: Okay.

Mr. Chun: Do you want to know the names of the– (Laughter in background)

Chair Keawe: That's okay.

Mr. Chun: No sense name them, right? (Laughter in background)

Chair Keawe: We will get there. Okay. Go ahead. You said there is a procedural issue you would like to start with.

Mr. Bradbury: Yes. Accompanying the reply brief that the petitioners' submitted was certain allegations of ethical conflict which, at this point in time, we've determined needs to be addressed prior to the hearing on all the various motions. What we suggest is that we set a hearing date on the ethical issue with a briefing schedule and come back and argue that because

when there is an attack on the ethicality of the County Attorney's Office, it becomes a threshold issue which could taint any future hearings or any discussions regarding future hearings. So what we would like to do is overcome that threshold issue before we proceed because when somebody raises a conflict like this, it puts us on notice that there is a potential conflict, and when you act in light of that conflict and you proceed with a case, it just makes things a little bit worrisome.

Chair Keawe: Okay.

Mr. Chun: If I may, Mr. Chair, also—

Chair Keawe: Mr. Chun.

Mr. Chun: Yes. I don't disagree with the request to continue this matter for the county to further look at this issue. I just wanted to emphasize that the objection that was raised by the petitioners was not an objection as to ethics. It was cited as an ethical consideration. It was not an objection on ethics. It was an objection raised regarding due process and potential conflicts of interest.

Chair Keawe: So it was a due process objection rather than an ethical objection?

Mr. Chun: Right, and that is why I want to make it clear. We did not object in any way or infer in any way that the County Attorney is acting in anything but an ethical manner, which is a different standard.

Chair Keawe: Yes.

Mr. Chun: I just want to make it clear that was not the objection.

Chair Keawe: Okay. It was a due process. We want to make sure we get that.

Mr. Chun: Right. Rather than go into detail, just that it was a due process constitutional issue.

Chair Keawe: Alright. Can we hear from the county representatives?

Mr. Bradbury: Sure. All the various county attorneys involved in this case, we addressed the issue raised by Jonathan Chun and his fellow attorneys. We did not see it as a due process issue. We saw it entirely as a conflict issue and the conflict was predicated upon Peter's involvement in this case at the same time that we are involved in the case. I don't see where the due process comes in. All I perceived was this was an ethical issue that has to be dealt with.

Chair Keawe: Okay.

Mr. Edwards: Well, whatever it is, we need to resolve it before we get to the merits of the matter, and the suggestion was made by the county attorneys and we have agreed that it makes sense to do that so we don't have to do things twice.

Chair Keawe: So you've already had your little discussion and have agreed to hear that issue before we start anything else?

Mr. Edwards: Yes.

Chair Keawe: And then in order to do that, we need to defer to a future meeting.

Mr. Edwards: That is correct and Mr. Bradbury has the schedule that we propose.

Chair Keawe: Okay. What is the schedule?

Mr. Bradbury: Well, the briefing schedule that we propose is the petitioners have four (4) weeks from today to submit their brief to support their position relative to the conflict and we have four (4) weeks in which to respond and thereby allow this Commission two (2) weeks, or even more, to set the hearing, so it would be sometime late November or early December.

Chair Keawe: Okay. Any questions? Mr. Ho.

Mr. Ho: Could you just recap that for me one more time? The steps that we are walking through here.

Mr. Bradbury: The briefing schedule or—

Mr. Ho: Yes, the briefing schedule.

Mr. Bradbury: Okay, the briefing schedule – we were going to allow the petitioners four (4) weeks in which to formally prepare their allegation of, I guess, due process or based upon ethics, and then we were going to have four (4) weeks in which to respond, and thereafter, whatever time the Commission needs to address the moving and responding papers, you can schedule a hearing.

Chair Keawe: Commissioner Streufert.

Ms. Nogami Streufert: My understanding is that we have already deferred this several times for preparatory things. How is this a different deferral than we have had in the past?

Mr. Bradbury: Well, this ethical issue that was raised was only raised in the reply. Now, generally speaking, replies...anything raised for the first time in a reply is not germane to the proceeding. However, when there is an issue that we perceive as an attack on the ethicality of the office, which could be raised at any time in the proceeding, we have to address that before we go further into the proceeding, and it is for that reason only that we are requesting this. If the Commission wants us to go forward today on the other underlying issues, we are prepared to do that, but there is going to be a motion in the future based upon this same attack and the Commission will have wasted all its time mulling over how to decide this predicament that we are in.

Chair Keawe: So you will agree to the schedule to defer?

Mr. Bradbury: Yes.

Chair Keawe: All of you?

Mr. Edwards: Barry Edwards. I agree.

Chair Keawe: Mr. Chun.

Mr. Chun: Jonathan Chun. On behalf of my clients, we do agree to the request by the county.

Chair Keawe: Mr. Kugle.

Mr. Kugle: Mr. Kugle. On behalf of my clients, yes, we agree also.

Chair Keawe: Okay. Well, I mean, that is what we are faced with at this point; was going with the deferral because potentially – I’m just speaking from my own opinion – potentially there will be a future challenge if we allow the case to proceed today because of this issue that needs to be addressed before we proceed. I think I have encapsulated that. Mr. Ho.

Mr. Ho: The testimony portion of this hearing is closed, so you are just going to argue something procedural. Is that right?

Mr. Edwards: That is what the purpose of this briefing schedule is; just the procedural issue, not the substantive merits of the matter which we have already closed the evidence on.

Mr. Mahoney: Okay.

Chair Keawe: Obviously, we have deferred this several times. This could not have been brought up sooner rather than right here?

Mr. Bradbury: It could have been brought up sooner and we could have dealt with it sooner. Unfortunately, it was brought up in the reply.

Chair Keawe: What does that mean, “brought up in the reply”? I’m sorry.

Mr. Bradbury: There was a cover letter attached to their reply brief and in the cover letter, there was reference to this purported conflict. Based upon that cover letter and the existence of this purported conflict, which had not arisen before, the County Attorney’s Office feels that it would be prudent to address that problem before we go forward.

Chair Keawe: Okay. Mr. Chun.

Mr. Chun: I don’t know what the Commission has in front of you [sic]. If you do [sic], then I apologize, but what happened was – and I guess that is what you want to know; what happened?

Chair Keawe: Yes, that would be good. (Laughter in background)

Mr. Chun: What happened is, if we recall at the end of the hearings, the Commission directed that the parties submit proposed Findings of Fact, Conclusions of Law I think by June or July, somewhere around there. Okay? We submitted ours on June 30th, I believe, 2017 through a transmittal letter by all the parties. All the petitioners got together, we came up with a joint Findings of Fact, Conclusions of Law and we came up with a joint letter transmitting that joint Findings of Fact, Conclusions of Law to the Commission; that was done on June 30, 2017. In the letter transmitting, we raised an objection saying based upon a Hawai'i Supreme Court case regarding participation of the County Attorney's Office – and I won't go into detail, but that was when it was first raised. I would agree with the county that is the first time it was raised; on June 30, 2017 when the transmittal of the proposed Findings of Fact, Conclusions of Law were sent to the Planning Commission and the Department. Whatever happened between June 30, 2017 and today's date, that's...it has been sitting there. I can explain what happened on June 30th, but (if) the question from the Commission is what happened in between there? I don't know.

Mr. Edwards: Well, I think it is fair to say that the county asked...we had a good discussion outside and we all agreed that this is the most practical way to resolve a problem that we all agree exists and nobody wants to budge very far on. We can't give up the issue, but we are certainly willing to have it addressed in orderly form so that it doesn't waste time and duplicate proceedings.

Chair Keawe: Okay. Mr. Mahoney.

Mr. Mahoney: I think everybody seems to be in agreement that this has to be resolved before we proceed and anything we do now would be just wasting time. If everybody agrees on it, I think we should move towards that direction to take care of this issue first and then set a date; that's my thoughts on the matter.

First Deputy County Attorney Matt Bracken: Matt Bracken, First Deputy County Attorney. The Planning Department, if possible at this time, would request a brief recess. We would like to speak to our client just for a couple minutes and if we could reconvene.

Chair Keawe: The Planning Department is requesting a recess?

Mr. Bracken: Yes, just a brief recess; just a couple minutes.

Chair Keawe: Any objection, Commissioners, to recess? Alright, let's recess for ten (10) minutes.

Mr. Bracken: Thank you.

The Commission recessed this portion of the calendar at 11:18 a.m.

The Commission reconvened this portion of the calendar at 11:32 a.m.

Chair Keawe: Let's reconvene, please. Okay. We took a short recess to evaluate the situation, so where are we at this point? Who would like to give us what you have come up with?

Deputy County Attorney Sinclair Salas-Ferguson: Good morning, Chair Keawe and fellow Commissioners. Sinclair Salas-Ferguson, Deputy County Attorney. I just wanted to make a few clarifications for the record. The deputy county attorneys here today, we want a decision on the recusal motion and that is what we wanted to do today was argue that and get that issue resolved. As you are aware, there is this new issue that was brought up when the proposed Findings of Facts and Conclusions of Law were sent to the Commission. As government attorneys, we are required to look into all these ethical issues. We spoke to the attorneys on the other side before this hearing today and the question was are you guys willing to withdraw this or do you want to go forward with this? Obviously, they did not want to withdraw that issue so we realized that it needs to be addressed by the Commission. We agreed that the proper way to do that is to bring forth a formal motion in front of the Commission so that it could be properly briefed by them and then by us, and that the Commission could make a decision on that so that the record is clear going forward. That is where we are at today. The position – we take a slight...not slight, but we take issue with the petitioners framing it as us requesting the continuance. The county's position is that the recusal motion itself is a delay tactic and that this is also, again, another delay tactic. And that is all, if you guys have any questions.

Chair Keawe: My question is do you have a proposed motion that is agreeable to both parties?

Mr. Salas-Ferguson: The motion would be from the petitioners, so they would be–

Chair Keawe: From the petitioners?

Mr. Salas-Ferguson: Yes, so they would be requesting that they can put forth that motion and we would not have an objection to that. From the county's side, we would request that it be heard as soon as possible with the understanding that these are complex issues and we would leave the briefing schedule to the Commission.

Chair Keawe: Okay. Counsel for petitioners, any comments?

Mr. Edwards: I do not want to get into a fight with Sinclair here today. (Laughter in background) He didn't talk to me about what he was about to say or anybody else on our side. We disagree, but we did have discussions before this hearing. We do believe this issue needs to be resolved and we do want to brief the issue. So the proposal that I understood that we agreed upon is what was told to you before the recess. If there is anything new, I have not agreed to it.

Chair Keawe: Okay. Mr. Chun.

Deputy County Attorney Peter Morimoto: I have a question. I have been sitting here since the onset and you raised the issue in June. Why did you not raise it sooner?

Mr. Chun: The issue...and I am trying to not argue what the issue is because that is going to be briefed.

Mr. Morimoto: Setting that aside, why did you not raise it sooner?

Mr. Chun: Because it came out in a case that I was reviewing and the other counsel was reviewing during the preparations of Findings of Fact, Conclusions of Law. That case...and it is contained in the transmittal so it is not like it is going to be secret, but that case is upwards of 60 to 80 pages long. We were not looking at that case for that particular issue, but reading through the entire case, we did see that issue come up by the Hawai'i Supreme Court and that is when we raised the issue. It was a constitutional issue. Constitutional issues are not waived and can be raised at any time, and that's why we felt...as soon as we found that, we raised that issue in the transmittal; that is when we discovered it, when we were looking and doing the Findings of Fact, Conclusions of Law as requested by the Commission to prepare.

Chair Keawe: At what point, Mr. Chun, or if ever, did you...was there any communication with the Planning Department with regard to that? Or you felt it was their responsibility to get back to you?

Mr. Chun: The communication was on June 30th.

Chair Keawe: Right, and that was it.

Mr. Chun: That was it.

Chair Keawe: Up until this morning.

Mr. Chun: Yes. We were anticipating that they were going to get back to us or file an objection, or something else, but that did not happen.

Chair Keawe: Alright. So you felt you raised the issue and the ball was in their court to do something?

Mr. Chun: Yes, or we were going to argue it today. If that is the Commission's...I mean, that's why, as far as the issue is concerned, we did agree because we had a discussion outside with the County Attorney's Office. We did agree that they wanted a chance to respond, which we thought it was reasonable. They thought it was reasonable that the Commission should be given written arguments; we said that is reasonable. So that is why we agreed to this process that...it was originally suggested to put everything in writing, give four (4) weeks to put it in writing, they have four (4) weeks to respond, and the Commission has a...we think that is reasonable. We do not agree...at least from my clients' perspective, we do not agree saying that we are the one that started the delay and we are not agreeing to the fact that we are making the motion.

Chair Keawe: Okay. Any rebuttal from the county?

Mr. Salas-Ferguson: I will rest on what I—

Chair Keawe: Excuse me. Do you have the motion written out so we can understand what it would be?

Mr. Salas-Ferguson: It would not be a motion from the county, Chair. It would be a motion from them, from the petitioners. I rest on what I said earlier. We disagree with how this all came up, but we do agree – like we said earlier – that it should be briefed properly and a decision made by the Commission.

Chair Keawe: Okay. I am getting confused here. So what you are saying is you will agree to what was previously said with regard to the motion? As far as you will make the motion as it was originally laid out. With the consultation with the county now, you are basically saying we are not going to do that.

Mr. Salas-Ferguson: I am not certain I understand you, Chair. Oh, is this...which...I don't understand you. Which motion are you speaking of?

Chair Keawe: Well, Mr. Chun said – and I think Mr. Williams [sic] confirmed – that they had agreed to do this deferral based on discussions with the county attorneys. Subsequent to that, we took a recess and you guys were going to get together and talk about it some more. Now, we are done with the recess, we get back in session, and Mr. Chun is saying – and Mr. Williams [sic] is confirming – that is not what we had agreed to. Am I clear on that or am I misconstruing any of that?

Mr. Edwards: Barry Edwards here. I agreed to what Mr. Bradbury told you before the recess and so did my other counsel; all at the same time, all outside the room.

Chair Keawe: Okay. Sorry, Mr. Edwards, I thought it was Williams. (Laughter)

Mr. Edwards: It is really okay. (Laughter in background) I will answer to almost anything. (Laughter in background) Thank you.

Chair Keawe: Alright.

Mr. Salas-Ferguson: Chair, what I just wanted to do was reframe it because Mr. Chun had framed it as if we were raising this, but in the rules themselves, they say that the Commission could deem the letter as...the objection as a motion. So that objection is essentially a motion. It is an objection.

Chair Keawe: The objection that you received on June 30th–

Mr. Salas-Ferguson: Correct.

Chair Keawe: –could be construed as a motion based on what you have raised. Is that true?

Mr. Salas-Ferguson: Our position is that the Commission can view the letter from Jonathan Chun as a motion and that is how we view it as well.

Chair Keawe: Alright. Mr. Chun.

Mr. Chun: I do not disagree with that. The letter can, under the rules, be construed to be a motion; no doubt, no objection to that.

Chair Keawe: Alright.

Mr. Chun: But it is a motion on the disqualification, not a motion to continue. But if they want to continue that motion, we do not object to that either. It is just that I am not making a motion to continue. I did make a motion on a disqualification issue on the County Attorney's Office, so I am not disagreeing with that.

Mr. Morimoto: You filed a motion to disqualify? I'm--

Mr. Chun: No--

Mr. Edwards: But he did agree to the briefing schedule that was outlined by Mr. Bradbury; that is the point and that is what we need to get to, as far as I am concerned.

Mr. Salas-Ferguson: I agree with Mr. Edwards. I think we just wanted to put that on the record from the county's side and I think that we can move forward with the briefing schedule. We are all in agreement that this issue needs to be resolved, the disqualification issue, before we continue on with the motion to recuse.

Chair Keawe: Okay. So the briefing schedule you have agreed to. Is that true? We are talking about November before we are going to see something. Can we do that sooner, I mean, than November? We have been deferring this for quite a while now.

Mr. Salas-Ferguson: And our client's position -- they would like to have this resolved as soon as possible. We will defer to the Commission as far as the schedule of the briefing goes.

Chair Keawe: Okay. Mr. Ho.

Mr. Ho: I think two (2) weeks should be sufficient to get this done, if we are going to--

Chair Keawe: Well, are you talking about the meeting on the 26th or the following meeting, which would be October whatever?

Mr. Ho: 26th.

Chair Keawe: 26th?

Mr. Mahoney: Chair, may I say something?

Chair Keawe: Mr. Mahoney, yes.

Mr. Mahoney: Whenever the scheduling takes place, everybody get their ducks in a row and let's be ready for it. If two (2) weeks aren't enough, let's get to a point where everybody is

ready, let's get these issues resolved and move forward because this is dragging on; even just between those tables it fluctuates. Let's get the issues out on the floor and we will deal with them and move forward. But I think whatever time frame we pick, let's get it all ready and prepared.

Chair Keawe: Commissioner Streufert.

Ms. Nogami Streufert: Right now, it appears from my perspective that there are two (2) proceedings here. Is that correct? One is that of the ethical issues and we have to get that resolved, and then only when that is resolved can we go on to your either due process/potential conflict of interest arguments. Is that correct?

Mr. Edwards: That is correct.

Ms. Nogami Streufert: So the first one that we are looking at right now is a deferral for whatever amount of time – whether it is two (2) weeks or two (2) months – for just the ethical issue. Is that correct?

Mr. Edwards: Yes.

Ms. Nogami Streufert: And then following that, you are anticipating another discussion about the potential conflict of interest and the due process that Mr. Chun has referred to. Is that correct?

Mr. Edwards: Not necessarily at a different time; following that, yes. There needs to be a decision on the ethical question or the conflict question; that is the first issue. Once that is decided, then you can proceed accordingly, but you must decide that issue first; that has been the consensus of all the lawyers on both sides, except for Peter, and I understand his position.

Mr. Morimoto: You do? Have I stated–

Mr. Edwards: At least I think I do.

Mr. Chun: Commissioner Streufert, again, I want to emphasize, the letter...and I would agree that, under the rules, it can be construed as a motion, but the letter – or my motion, whatever you want to call it – does not raise an ethical charge against the County Attorney's Office. It is a letter and the letter will speak for itself. It was an issue regarding the due process requirements that every government agency and government body has to follow and how that due process is impacted by the County Attorney's involvement in this process. Now, that is why I am not raising it and I never have, nor ever will, raise it or question the ethical considerations of the County Attorney's Office; that was not raised by us.

Ms. Nogami Streufert: So where did this come from?

Chair Keawe: We are totally confused. Mr. Edwards says we have to solve the ethical issue first, before we discuss the due process. You are saying we are not going to raise the ethical issue, so tell us, please, where you are at.

Mr. Chun: Okay. Again...and I will go back from what I did and what my position has been from the very beginning. It is a due process constitutional issue. Based upon that, it is my understanding – and the County Attorney’s Office can correct me – but it is their position that they construed that to be an ethical charge. They can construe it whatever they want. I have never raised it. In my view, the ethical considerations are a different consideration from constitutional. Sometimes they sound alike, but the tests are really different, the rules are really different, and I have never raised the ethical consideration issues. Now, how they are raising or feel or they are construing it to be an ethical...that is their call, but I have never raised it. I don’t think any of the petitioners have ever raised that as an ethical consideration.

Chair Keawe: Okay. So Mr. Edwards, do you want to do what you said five (5) minutes ago again? Because I heard that you need to settle the ethical issue first before we talk about due process.

Mr. Edwards: Yes. Let me try and...I am not going to fight with Jon either, but the question is can Peter Morimoto serve as your lawyer when his boss serves as an advocate or his colleagues in the same office? That is the question.

Chair Keawe: Alright.

Mr. Edwards: We need to resolve that because if he can’t under the law that has been raised and that will be briefed, then he can’t advise you, and then someone else has to be put in his seat. Only when they are in his seat can you decide – if you intend to ask your lawyer for advice, which you probably should – can you decide the merits of the case of the disqualification of Mr. Kimura. I apologize if I have created confusion, but that was my understanding of why we are proposing this.

Chair Keawe: Okay. Let’s get back to where we were. So the letter that was transmitted on June 30th can serve as a motion and the letter...does anyone have a copy of that? So we can read it, so we know what the motion is and what it says. How about this? Let’s take a real quick, ten (10) minute break. We need to see a copy of that letter; hopefully you have one.

Mr. Chun: Yes, no problem. Also, after the break, I think we should hear from the intervenors also.

Chair Keawe: (Inaudible) what?

Mr. Chun: The intervenors.

Chair Keawe: I spoke to the intervenors and I think they are good.

Mr. Chun: Oh, okay.

Chair Keawe: Yes. Okay, ten (10) minutes. Let's find that letter.

The Commission recessed this portion of the calendar at 11:50 a.m.

The Commission reconvened this portion of the calendar at 12:03 p.m.

Chair Keawe: We will go ahead...back in session. I think Mr. Morimoto has a question.

Mr. Morimoto: Mr. Chun, I am looking at the case that you cited and there is a section in the case that reads as follows, "A party asserting grounds for disqualification must timely present the objection, either before the commencement of the proceeding or as soon as the disqualifying facts become known." Now, given the fact that I have been sitting here since the onset and you knew about my participation and the fact that I was a deputy county attorney and that Mauna Kea Trask was my boss, why didn't you raise this issue sooner?

Mr. Chun: The Commission can decide that issue. I already explained how that issue came about and when I first saw the issue as raised by the Hawai'i Supreme Court case and I saw that in the decision, I raised it on June 30, 2017.

Mr. Morimoto: Well, it does not talk about knowing the law and this case has been around since 2000, so the question, again, is why wasn't this raised sooner?

Mr. Chun: That is when I discovered the case law regarding...

Mr. Morimoto: But you knew of the facts and that is what this case talks about.

Mr. Chun: Are we—

Mr. Morimoto: The fact that you knew of the facts—

Mr. Chun: I answered that question, Mr. Morimoto, and if the Commission does not believe that, they can rule it when they rule on the motion.

Chair Keawe: Alright. Thank you.

Mr. Salas-Ferguson: Chair Keawe, I think I have some good news.

Chair Keawe: Alright. Where are we?

Mr. Salas-Ferguson: We went back and we revisited the issue and we have agreed on a briefing schedule, of course, with the ultimate decision being whether or not the Commission wants to hear it, but we have agreed to have the petitioners file a formal motion on September 25th. The county's opposition would be due October 6th and we could get it on for hearing October 10th, and then also put all of the contested cases on the agenda for that day so that—

Chair Keawe: Same day, the 10th?

Mr. Salas-Ferguson: Yes.

Chair Keawe: October 10th.

Mr. Salas-Ferguson: October 10th so the Commission could resolve the issue of this new motion and then see what happens after that, and then go back to the recusal motion or not.

Chair Keawe: Alright. Discussion. Mr. Mahoney.

Mr. Mahoney: Chair, I think that is a good schedule if we can get everybody's attendance.

Chair Keawe: Okay. So we are talking September 25th for briefs, October 6th...was that--?

Mr. Salas-Ferguson: Yes, so the petitioners' motion – the formal motion, the written motion – would be due September 25th.

Chair Keawe: Yes.

Mr. Salas-Ferguson: The County's opposition to that motion would be due October 6th.

Chair Keawe: October 6th, okay.

Mr. Salas-Ferguson: And then it would come on for hearing--

Chair Keawe: It would be heard on the 10th.

Mr. Salas-Ferguson: Correct.

Chair Keawe: Okay. Does everybody agree? Now, getting back to the issue about the motion. Are we still talking about using the letter as the motion? Or do we have to make a new motion based on what you have agreed to?

Mr. Salas-Ferguson: No. So the letter...we have agreed that they would, I guess, extrapolate on that objection, which the Commission now considers a motion, so they are going to file something with the Commission in writing explaining their position, and that will be the motion that is due September 25th.

Chair Keawe: And that is due on the 25th.

Mr. Salas-Ferguson: Correct.

Chair Keawe: So as far as we are concerned and as far as all counsel, there is nothing more to discuss with regard to this. The next issue would be on September 25th. Is that right?

Mr. Salas-Ferguson: October 10th would be the hearing.

Chair Keawe: No, the 25th is when the first trigger happens.

Mr. Salas-Ferguson: Correct.

Chair Keawe: And then the 6th and then the 10th.

Mr. Salas-Ferguson: Correct.

Chair Keawe: And then we will basically hear it on the 10th. Is that correct?

Mr. Salas-Ferguson: Yes. You will have the papers and if the Commission wants any further argument on the 10th, the Commission will make a decision.

Chair Keawe: Okay. Mr. Morimoto.

Mr. Morimoto: I am looking at...Leslie just provided me with the copy of your schedules and I guess the question would be if we are going to have a quorum on that day.

Chair Keawe: September 26th.

Mr. Morimoto: Well, the hearing itself will be on the 10th. You are just going to be submitting written (inaudible) or motions.

Mr. Salas-Ferguson: Correct.

Mr. Ho: October 10th you are going to be submitting--

Mr. Salas-Ferguson: No, so--

Chair Keawe: No, we are going to hear it on the 10th.

Mr. Ho: Hearing on the 10th. Mr. Keawe.

Chair Keawe: Yes.

Mr. Ho: I have kind of been on it from the beginning of this thing. October 10th is when I may not be here. I would like to stay with this to the end.

Chair Keawe: Okay. Well, that is an issue because we may not have quorum that day. I believe we can go the...let's see. Wade, how about the 24th? Are you here? Yes? Okay. Preliminarily, we would have quorum on the 24th of October. We have...the 26th we have quorum. So we've got September 26th and October...Roy is a no. Well, we still have two (2) other commissioners we need to poll, so should we go ahead and try to shoot for these dates? And then we need to poll the Commissioners and see if we can get a quorum. I think it is more important so why don't we try to stay with what you have agreed to at this point and hopefully we can, as a commission, have a quorum to go ahead and move forward. Is that acceptable to everyone?

Mr. Mahoney: Chair.

Chair Keawe: Yes.

Mr. Mahoney: The two (2) commissioners that are here are not going to be able to make that so we are missing two (2) to start off with.

Chair Keawe: Yes. So on the 26th we have quorum because we have enough people to—

Mr. Mahoney: October 26th?

Chair Keawe: No, September. October 24th we have three (3) and we still have...no, we have four (4), so we have quorum on October 24th.

Mr. Mahoney: Okay.

Chair Keawe: And October 10th, we currently have three (3) but we have two (2) commissioners missing that we need to poll.

Mr. Mahoney: Okay.

Chair Keawe: So I guess the question is do we want to try to stick with the original schedule and try to get confirmation from Commissioners...Leslie, is that possible? Can we kind of poll? I think Donna is on a trip, but Kanoe may...they are both out.

Planning Commission Secretary Leslie Takasaki: They are both out of state right now.

Chair Keawe: Yes, okay. Commissioner Streufert.

Ms. Nogami Streufert: If we stuck to that schedule, are you sure that you can make that without another deferral?

Mr. Edwards: If you are asking Barry Edwards, yes.

Ms. Nogami Streufert: Okay.

Mr. Salas-Ferguson: We are confident on both sides that we can stick to that briefing schedule.

Ms. Nogami Streufert: Thank you.

Chair Keawe: Alright. Well, I guess we will try to stick with this schedule and if there is any change based on quorum, we will let you know, but let's go ahead and try to stick with this schedule. Now, do we...again, I ask the question, Peter, do we need to do anything with regard to a motion as far as this letter is concerned? We talked about...and then you are saying no. Because we have all agreed to the hearing schedule. Is that all we need to do?

Mr. Edwards: That is all I think you need to do.

Chair Keawe: Okay. I just want to make sure that nobody raises an objection later saying well, you guys didn't make a motion or whatever else.

Mr. Edwards: No. We have agreed to the process and the timing, as long as the Commission agrees.

Chair Keawe: Yes, okay. Any further discussion? No? Any questions for any of the participants? If not...so we agree to abide by the joint schedule between the petitioners and everyone else based on the September 25th, October 6th, and October 10th dates, and that would be subject to quorum of the Planning Commission.

Mr. Edwards: That is acceptable to me, your Honor.

Chair Keawe: Alright. Mr. Chun.

Mr. Chun: That is acceptable to my clients.

Chair Keawe: Mr. Kugle.

Mr. Kugle: Acceptable.

Chair Keawe: Yes.

Mr. Salas-Ferguson: And it is agreeable to all the county attorneys.

Chair Keawe: Okay. Intervenors, sorry, are you guys okay?

Unidentified Speaker: Agreeable.

Chair Keawe: Okay. Is that it? We don't need a motion?

Mr. Mahoney: You do need a motion.

Chair Keawe: Alright. So can I have a motion?

Mr. Mahoney: Chair, I move to defer the hearing as prescribed; the petitioners get their submittal by September 26th, the county has their opposition by October 6th, and the hearing is October 10th.

Chair Keawe: Alright. I need a second.

Mr. Lord: Second.

Chair Keawe: It has been moved and seconded. Any further discussion on the motion? Mr. Edwards.

Mr. Edwards: September 25th, I know that was intended, not the 26th. The 25th of September is when we are supposed to get our submittal.

Mr. Mahoney: Did I say 26th?

Mr. Edwards: Yes.

Mr. Mahoney: Excuse me. I will withdraw that. It is September 25th.

Chair Keawe: Okay. So it has been moved and seconded. Any further discussion? All those in favor? (Unanimous voice vote) Any opposed? (None) Motion carried 5:0.

ADJOURNMENT

Chair Keawe: Anything else? (Laughter) I will entertain a motion to adjourn.

Mr. Mahoney: Chair, move to adjourn.

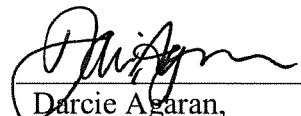
Chair Keawe: Do I have a second?

Mr. Lord: Second.

Chair Keawe: It has been moved and seconded. Meeting adjourned.

Chair Keawe adjourned the Contested Case Calendar at 12:14 p.m.

Respectfully submitted by:



Darcie Agaran,
Commission Support Clerk

() Approved as circulated (add date of meeting approval)

() Approved as amended. See minutes of _____ meeting.